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No. 95-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTHONY AND SHIRLEY OLBRES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. KATSAS
GREGORY A. CASTANIAS
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

QUESTIONS PRESENTED

1. In federal criminal trials, whether district courts may properly decline to instruct the jury on what constitutes proof "beyond a reasonable doubt."

2. Whether the Double Jeopardy Clause permits the government to appeal fact-based judgments of acquittal rendered after jury verdicts of guilty.

PARTIES TO THE PROCEEDINGS

The parties in this case are petitioners Anthony and Shirley Olbres (appellees below) and respondent United States of America (appellant below). None of the parties is a corporation with parent companies or partly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Anthony and Shirley Olbres respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 61 F.3d 967 and is reprinted beginning at page 1a of the appendix to this petition. The opinion of the United States District Court for the District of New Hampshire is reported at 881 F. Supp. 703 and is reprinted beginning at page 17a of the appendix to this petition. The jury instruction at issue is unreported and is reprinted beginning at page 46a of the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS

The provisions at issue in this case are the Fifth Amendment Due Process and Double Jeopardy Clauses (U.S. Const. Amend. V), the Criminal Appeals Act (18 U.S.C. § 3731), and Federal Rule of Criminal Procedure 29. These provisions are reprinted beginning at page 43a of the appendix to this petition.

STATEMENT OF THE CASE

This case presents two recurring and important questions of criminal procedure: first, whether the district courts may properly decline, either as a matter of Due Process or appropriate federal practice, to instruct the jury on what constitutes proof "beyond a reasonable doubt"; and second, whether the Double Jeopardy Clause permits the government to appeal fact-based judgments of acquittal rendered after jury verdicts of guilty. The appropriateness of defining "reasonable doubt"—a question that arises in literally every criminal trial—has deeply divided the federal courts of appeals. And this Court has long held, contrary to the decision below, that the Double Jeopardy Clause bars the government from appealing any fact-based judgments of acquittal resting on a failure of proof at trial.

1. In 1974, petitioners Anthony and Shirley Olbres began a family business designing and marketing trade show booths. Pet. App. 20a. Mr. Olbres built and sold the booths; Mrs. Olbres served as the part-time bookkeeper. *Id.* During the mid-1980s, petitioners' business experienced "phenomenal growth," generating annual revenues of over $1.9 million by 1987. Pet. App. 2a. Despite her "unchallenged accounting incompetence" (Pet. App. 39a), Mrs. Olbres continued to keep the company's financial records, which "were generally sloppy and and contained many errors" (Pet. App. 20a).

Between 1976 and 1988, petitioners retained Wilson Dennett, a certified public accountant, to prepare their tax returns. Although "independent and honest" (Pet. App. 36a), Dennett "was not without some professional deficiencies" (Pet. App. 20a-21a). Petitioners "necessarily relied" on Dennett to prepare their complex returns accurately. Pet. App. 20a-25a.[1] Petitioners supplied Dennett with adequate records for him to properly calculate their tax liability. Pet. App. 35a-40a, Gov't Trial Ex. 67(b), Def'ts Trial Exhs. TT, RRR. Nonetheless, between 1986 and 1988, Dennett failed to include on petitioners' tax returns approximately $1.1 million out of petitioners' gross income of over $3.5 million. Pet. App. 3a, 22a, Gov't Trial Ex. 82(a), 82(c).[2]

2. Respondent United States of America filed charges against petitioners for criminal tax evasion, in violation of 26 U.S.C. § 7201.[3] At trial, petitioners conceded that the tax returns had understated their income, but argued that the understatements were not "willful"—a statutory element requiring the "voluntary, intentional violation of a known legal duty," *see Cheek v. United States*, 498 U.S. 192, 201 (1991). Pet. App. 19a. At the close of the evidence, petitioners moved for judgments of acquittal on the ground that the evidence was "insufficient to sustain a

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[1] Petitioners' 1988 return alone was 24 pages long. Gov't Trial Ex. 1(c).

[2] Specifically, Dennett failed to include $151,000 in 1986 (on gross income of $913,000), $749,000 in 1987 (on gross income of over $2 million), and $175,000 in 1988 (on gross income of $625,000).

[3] In pertinent part, § 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax" imposed by the Internal Revenue Code "shall . . . be guilty of a felony."

conviction." Fed. R. Crim. P. 29(a).[4] The court reserved its decision until after the verdict.

The district court instructed the jury of the government's constitutional obligation, *see In re Winship*, 397 U.S. 358 (1970), to prove each element of the offense "beyond a reasonable doubt." Pet. App. 46a. However, following First Circuit precedent in *United States v. Olmstead*, 832 F.2d 642 (1st Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988), which held that "an instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof" (*id.* at 646), the district court did not define for the jury what constitutes a "reasonable doubt." Pet. App. 46a.[5]

The jury deliberated for three days and then "declared itself deadlocked," but the district court "urg[ed] the jury to continue." Pet. App. 17a. The jury then submitted several questions about the evidence. The district court refused to answer, instead instructing the jury to "rely on your own memory" and "discuss it among yourselves." Trial Tr., Jan. 24, 1994, at 6-7. The jury then returned a verdict of not guilty as to counts 1 and 3 of the indictment (relating to the 1986 and 1988 tax returns), but guilty as to count 2 (relating to the 1987 return). Pet. App. 17a.

3. Following the verdict, the district court granted petitioners' motion for judgments of acquittal. The court undertook, in the words of the court of appeals, "a painstakingly thorough

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[4] In pertinent part, Rule 29(a) permits a defendant to move for "the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence of either side is closed if the evidence is insufficient to sustain a conviction for such offense or offenses."

[5] Petitioners did not seek an instruction defining "reasonable doubt" in the courts below—which were bound, of course, to follow controlling First Circuit precedent in *Olmstead* and its progeny (*see infra* note 9). There is no forfeiture under these circumstances. *See, e.g., United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc).

examination of the record." Pet. App. 12a. The court explained that petitioners operated a legitimate business, accepted no cash payments, deposited all unreported checks into local bank accounts maintained in their own name, and declared and paid taxes on all interest generated by those deposits. Pet. App. 22a, 36a. Further, the court explained that petitioners regularly maintained a single set of business records which, although "sloppy," exhibited no alterations or other "badges of fraud." Pet. App. 20a, 38a. Further, the court explained that petitioners employed for several years the same "independent and honest" accountant to prepare their tax returns, that they supplied him with adequate records to prepare those returns properly, and that they "necessarily relied" on him given the unusual complexity of their tax situation. Pet App. 24a, 38a-42a. Further, the court explained that petitioners acted inconsistently with any reasonable hypothesis of willfulness, by depositing all unreported income into interest-bearing accounts (thus ensuring that the government would receive Form 1099s blazing a "paper trail" that was "easily followed"), and by filing for a "relatively small" refund in 1988 (thus "invit[ing] regulatory attention" to their returns). Pet. App. 37a. The court concluded that the evidence could not support a finding of guilt beyond a reasonable doubt, and it accordingly entered judgments of acquittal for petitioners. Pet. App. 42a.

4. Accepting jurisdiction under *United States v. Forcellati*, 610 F.2d 25 (1st Cir. 1979), *cert. denied*, 445 U.S. 944 (1980), which permitted "appeals from judgments of acquittal entered on defense motions after jury verdicts of guilty" (*id.* at 29), the court of appeals reversed and reinstated the verdicts. On the merits, the court grudgingly acknowledged that Dennett, based on the records provided to him by petitioners, should have prepared their 1987 tax return properly. Pet. App. 8a (accepting "hypothesis that the accountant's incompetence sparked the myriad misstatements embedded in the return"). Nonetheless, the court reasoned that petitioners "must have gained an awareness" of those mistakes when they signed the return (*Id.*). The Court acknowledged, however, that the evidence against petitioners was only

"circumstantial and suggestive" (Pet. App. 7a), and that a hypothesis of innocence was "plausible" on this record (Pet. App. 10a).

REASONS FOR GRANTING THE WRIT

Each court below rendered a legal ruling that warrants this Court's review. The district court, following *Olmstead*, declined to instruct the jury on the meaning of proof "beyond a reasonable doubt." And the court of appeals, following *Forcellati*, accepted jurisdiction over the government's appeal from a fact-based judgment of acquittal resting on a failure of proof at trial. Each of these errors, if not corrected, will undercut important procedural protections—especially critical in marginal cases such as this one—against the risk of convicting the innocent.

I. THIS COURT SHOULD DETERMINE WHETHER DISTRICT COURTS MAY PROPERLY DECLINE TO INSTRUCT ON THE MEANING OF PROOF "BEYOND A REASONABLE DOUBT"

The Due Process Clause requires the government to prove guilt "beyond a reasonable doubt" (*Winship*, 397 U.S. at 364) and requires courts to so instruct juries. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 317-19 (1979). Thus, in literally every criminal trial in the Nation, the district or trial court must decide whether to define for the jury what constitutes a "reasonable doubt." The decision is critical, for "[t]he reasonable doubt standard plays a vital role in the American scheme of criminal procedure." *Winship*, 397 U.S. at 363.

The district court's refusal under *Olmstead* to define a "reasonable doubt" warrants this Court's review for at least two separate reasons. First, the courts of appeals are deeply divided on this important and continuously recurring question. Second, in following *Olmstead*, the decision below conflicts with several decisions of this Court.

A. The Courts of Appeals Are Deeply Divided On Whether District Courts Should Define Proof "Beyond A Reasonable Doubt"

"The courts of appeals are divided about if, when, and how the concept of 'reasonable doubt' should be defined." *United States v. Reives*, 15 F.3d 42, 44 (4th Cir.), *cert. denied*, 114 S. Ct. 2679 (1994). Universally acknowledged, the split is one of the deepest and most enduring in federal law today.[6]

Six courts of appeals require or strongly encourage the district courts to define what constitutes proof "beyond a reasonable doubt." The Third, Eighth and Tenth Circuits require a definition of "reasonable doubt." *See, e.g., United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974) (defendant "is entitled to have the meaning of reasonable doubt explained to the jury"); *Friedman v. United States*, 381 F.2d 155, 160 (8th Cir. 1967) (district courts have a "duty to instruct on the meaning of 'reasonable doubt'"); *Blatt v. United States*, 60 F.2d 481, 481 (3d Cir. 1932) (reversing conviction where district court gave "no instruction upon the meaning in the law of the term 'reasonable doubt'"). The Second, Fifth and Sixth Circuits strongly encourage the use of pattern instructions defining "reasonable doubt" in terms of a hesitation to act in important affairs. *See, e.g., United States v. Williams*, 20 F.3d 125, 128-29 n.1 (5th Cir.) ("we have encouraged the district courts in this Circuit to use this Circuit's Pattern Jury Instruction on the definition of

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[6] Commentators on all sides of this question have noted the deep split among the courts of appeals. *Compare, e.g.*, Note, *Reasonable Doubt: To Define or Not To Define*, 90 Colum. L. Rev. 1716, 1717 (1990) (hereafter "Columbia Note") (arguing for definition) ("The federal and state courts have failed to agree on whether the requirement of proof beyond a reasonable doubt also requires that reasonable doubt must be defined in jury instructions."), *with, e.g.*, Note, *Reasonable Doubt: An Argument Against Definition*, 108 Harv. L. Rev. 1955, 1956 (1995) ("some appellate courts discourage use of a definition, some favor a definition, and some leave the matter to the discretion of the trial court").

reasonable doubt"), *cert. denied*, 115 S. Ct. 239 (1994); *United States v. Goodlet*, 3 F.3d 976, 979 (6th Cir. 1993) ("approv[ing]" Sixth Circuit pattern instruction); *United States v. Ivic*, 700 F.2d 51, 69 (2d Cir. 1983) ("trial judges would be exceedingly well advised" to use Devitt & Blackmar pattern instruction).[7] *See also United States v. Harris*, 974 F.2d 84, 85 (8th Cir. 1992) (approving similar Eight Circuit pattern instruction).

Four courts of appeals prohibit or strongly discourage the district courts from defining what constitutes proof "beyond a reasonable doubt." The Fourth and Seventh Circuits have long prohibited any definition. *See, e.g., United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir.) ("We have reiterated time and again our admonition that district courts should not attempt to define reasonable doubt."), *cert. denied*, 114 S. Ct. 393 (1993); *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988) ("[w]e have frequently admonished district courts not to attempt to define reasonable doubt in their instructions to the jury").[8] The D.C. Circuit recently embraced this position as well. *See United States v. Taylor*, 997 F.2d 1551, 1558 (D.C. Cir. 1993) ("the greatest wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction to leave to juries the task of deliberating the meaning of reasonable doubt"). The First Circuit, as noted above, has held that "an instruction which uses the words reasonable doubt

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[7] The Sixth Circuit has distinguished between appropriate federal practice and the requirements of due process. While *Goodlet* encourages a definition of "reasonable doubt" in all federal cases (*see* 3 F.3d at 979), the Sixth Circuit uses a "totality of the circumstances" test "to determine whether a failure to define reasonable doubt . . . violates the due process clause." *Whiteside v. Parke*, 705 F.2d 869, 872 (6th Cir.), *cert. denied*, 464 U.S. 843 (1983).

[8] The Fourth Circuit has even held that the district courts must not attempt to define reasonable doubt after a specific request from the jury. *See Reives*, 15 F.3d at 45-46.

without further definition adequately apprises the jury of the proper burden of proof." *Olmstead*, 832 F.2d at 646.[9]

Finally, two courts of appeals give district courts broad discretion whether or not to define what constitutes proof "beyond a reasonable doubt." The Ninth Circuit, sitting en banc, after canvassing the split between circuits that "discourage or even condemn the use of reasonable doubt definitions," and circuits where "trial courts are required to define reasonable doubt," held that "an appropriate instruction defining reasonable doubt is permissible but not necessarily required." *United States v. Nolasco*, 926 F.2d 869, 872 (9th Cir.) (en banc), *cert. denied*, 502 U.S. 833 (1991). Similarly, the Eleventh Circuit has given "broad discretion" to district courts "formulating a jury instruction" about "reasonable doubt." *United States v. Daniels*, 986 F.2d 451, 456 (11th Cir.), *withdrawn in part on rehearing*, 5 F.3d 495 (1993), *cert. denied*, 114 S. Ct. 1615 (1994).

In sum, the twelve regional courts of appeals are now split 6-4-2 on an important question that arises in literally every criminal trial in the country. Future percolation is unlikely to further develop the issue, which every court has addressed at least once, and which most have addressed several times. Given the depth of the split, and the absence of any discernible trend in recent

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[9] While *Olmstead* left open the possibility of some district court "discretion" (832 F.2d at 646), subsequent decisions have confirmed that the First Circuit disfavors any attempt to define a "reasonable doubt." *See, e.g., United States v. Neal*, 36 F.3d 1190, 1202 (1st Cir. 1994) ("attempts to imbue the phrase with exact definition are fraught with pitfalls"); *United States v. Vavlitis*, 9 F.3d 206, 212 (1st Cir. 1993) (attempted definition "contains language that is unnecessary, could confuse the jury, and provides fertile grounds for objections. Reasonable doubt is a fundamental concept that does not easily lend itself to refinement or definition."); *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1160 (1st Cir.) (attempted definition is "instruction . . . of a type disfavored by this court"), *cert. denied*, 502 U.S. 809 (1991).

decisions,[10] any semblance of uniformity is impossible absent prompt review by this Court.

B. This Court's Decisions Strongly Support Defining "Reasonable Doubt" In Federal Trials

In following *Olmstead* and refusing to define what constitutes proof "beyond a reasonable doubt," the decision below conflicts with this Court's decisions, which strongly suggest that the Due Process Clause requires a definition of "reasonable doubt" and which, in any event, repeatedly have approved instructions defining "reasonable doubt" in federal trials. As Justice Ginsburg has explained, "[w]hether or not the Constitution so requires, . . . the argument for defining the concept is strong." *Victor v. Nebraska*, 114 S. Ct. 1239, 1253 (1994) (opinion concurring in part and concurring in the judgment).[11]

To begin with, notwithstanding the present division of authority in the courts of appeals, the use of instructions defining "reasonable doubt" has a long historical pedigree at common law. *See, e.g., Hopt v. Utah*, 120 U.S. 430, 439-41 (1887); *Miles v. United States*, 103 U.S. 304, 312-13 (1880) (citing cases); *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850) (Shaw, C.J.), *discussed in Victor*, 114 S. Ct. at 1244-47; *Rex v. Muller*,

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[10] In fact, the two courts of appeals to recently change their positions moved in opposite directions. Prior to "encourag[ing]" a definition of "reasonable doubt" in *Williams* (20 F.2d at 128 n.1), the Fifth Circuit had formerly "disfavored" attempts "to define 'reasonable doubt.'" *Thompson v. Lynaugh*, 821 F.2d 1054, 1061 (5th Cir.), *cert. denied*, 483 U.S. 1035 (1987). Prior to announcing in *Taylor* that the "greatest wisdom" is to leave "reasonable doubt" undefined (997 F.2d at 1558), the D.C. Circuit had formerly "regarded[ed] it as the better practice to define." *Mundy v. United States*, 176 F.2d 32, 33 (D.C. Cir. 1949) (per curiam).

[11] Of course, because this case involves a *federal* trial, this Court may require a definition of "reasonable doubt" even if the Constitution does not. *Cf. Victor*, 114 S. Ct. at 1248 ("we have no supervisory power over the *state* courts" (emphasis added)).

4 Fost. & Fin. 388-89, note (a) (1865). Refusals to define are therefore "abrogations of common law procedures" that are likely to violate Due Process. *See Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2340 (1994).

Moreover, this Court's decisions strongly suggest that a definition of "reasonable doubt" is constitutionally compelled. For example, in *Jackson*, the Court explained that a reasonable doubt instruction must "impres[s] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." 443 U.S. at 315. Moreover, in *Taylor v. Kentucky*, 436 U.S. 478 (1978), the Court held that an instruction defining the "presumption of innocence" was constitutionally compelled (*id.* at 490), and it criticized the "truncated" reasonable doubt instruction used in that case (*id.* at 488). Finally, in *Holland v. United States*, 348 U.S. 121 (1954), the Court indicated that a jury must be "properly instructed on the standards for reasonable doubt" (*id.* at 139) and that the instructions must "correctly conve[y] the concept of reasonable doubt to the jury" (*id.* at 140).[12]

This Court also has held that Due Process requires a jury to "rationally apply" the reasonable doubt standard in individual cases. *See Jackson*, 443 U.S. at 317. But such rationality is highly unlikely without any definition, for the phrase "beyond a reasonable doubt" is a legal term of art that "does not have a self-evident meaning" to lay people. *See Nolasco*, 926 F.2d at 873 (Wiggins, J., dissenting). Indeed, empirical evidence suggests that jurors cannot even distinguish the reasonable doubt and preponderance standards unless they are further defined and explained. *See, e.g., id.* at 873-74 (citing studies); Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. Rev. 979, 984 &

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[12] Although a dictum in *Victor* suggested that the Due Process Clause "neither prohibits . . . nor requires" a definition of "reasonable doubt" (114 S. Ct. at 1243), this Court has never "held that the Constitution does not require trial courts to define reasonable doubt." *Id.* at 1253 (Ginsburg, J., concurring in part and concurring in the judgment).

n.23 (1993) (same); Columbia Note, *supra* note 6, at 1723-24 (same).

Finally, this Court has approved a wide range of definitions of "reasonable doubt" as appropriate for use in federal trials. *See, e.g., Holland*, 348 U.S. at 140 ("hesitate to act" formulation); *Perovich v. United States*, 205 U.S. 86, 92 (1907) (*Webster* charge); *Hopt*, 120 U.S. at 439 ("abiding conviction" formulation); *Miles*, 103 U.S. at 309 ("moral certainty" formulation). While some of these definitions might be sounder than others, *see Victor*, 114 S. Ct. at 1244-51, the decisions clearly establish this Court's preference for *some* definition of "reasonable doubt," at least in federal court. The First Circuit has worried that "[m]ost attempts at clarification result in further obfuscation." *Olmstead*, 832 F.2d at 645. But as Chief Judge Posner has asked, rhetorically: "Is a refusal to define key terms consistent with the search for truth?" *United States v. Hall*, 854 F.2d 1036, 1043 (7th Cir. 1988) (Posner, J., concurring). *See also* Newman, *supra*, at 984 ("I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it."). In any event, even assuming that "[m]ost" definitions are risky, there still remain several widely used pattern instructions which afford "a definition of reasonable doubt that is clear, straightforward, and accurate." *Victor*, 114 S. Ct. at 1253 (Ginsburg, J., concurring in part and concurring in the judgment).[13]

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[13] Only once has this Court invalidated a definition of "reasonable doubt." *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). The instruction in *Cage* was particularly extreme, however, defining a "reasonable doubt" as an "actual substantial doubt" and a "grave uncertainty." *See id.* at 40. Notwithstanding *Olmstead*'s concern about "increased appellate litigation" (832 F.2d at 645), use of a standard "reasonable doubt" instruction would pose little if any risk of reversal.

II. THIS COURT SHOULD DETERMINE WHETHER THE DOUBLE JEOPARDY CLAUSE PERMITS THE GOVERNMENT TO APPEAL ANY FACT-BASED JUDGMENTS OF ACQUITTAL

"It has long been established that the United States cannot appeal in a criminal case without express congressional authorization." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977). Here, the government invoked the Criminal Appeals Act, 18 U.S.C. § 3731, a jurisdictional statute construed by this Court to authorize any appeal by the government that would not violate the Double Jeopardy Clause. *See, e.g, Martin Linen Supply Co.*, 430 U.S. at 568. Thus, appealability in this case turns on double jeopardy principles.

"[T]he Double Jeopardy Clause attaches special weight to judgments of acquittal." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982). For double jeopardy purposes, an "acquittal" is an order that "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571. *Accord, e.g., Sanabria v. United States*, 437 U.S. 54, 71 (1978) (following *Martin Linen* definition of "acquittal"); *Burks v. United States*, 437 U.S. 1, 10 (1978) (same); *Lee v. United States*, 432 U.S. 23, 30 n.8 (1977) (same). The order in this case, a judgment of "acquittal" under Rule 29 on the ground that the "evidence is insufficient to sustain a conviction," Fed. R. Crim. P. 29(a), unquestionably constitutes an acquittal for double jeopardy purposes. *See Martin Linen*, 430 U.S. at 570-72.

Applying *Forcellati*, 610 F.2d at 29, the court of appeals permitted the government to appeal petitioners' judgments of acquittal on the ground that they were entered after a verdict of guilty. In that respect, its decision conflicts with numerous decisions of this Court. Review is warranted to address the important question whether the government may appeal judgments of acquittal entered after a verdict of guilty.

A. The Decision Below Conflicts With *Ball*, *Kepner* And Numerous Other Decisions Of This Court

For almost a century, this Court consistently has held that the Double Jeopardy Clause prevents the government from appealing any judgment of acquittal. In *United States v. Ball*, 163 U.S. 662 (1896), the Court first announced the rule that a "verdict of acquittal was final, and *could not be reviewed*, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." *Id.* at 671 (emphasis added). In *United States v. Sisson*, 399 U.S. 267, 289 (1970), the Court described the *Ball* rule as "well settled." And in *Martin Linen*, the Court described the *Ball* rule as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." 450 U.S. at 571-72. *See also Sanabria*, 437 U.S. at 77 ("judgment of acquittal" is "final and unreviewable"); *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978) (noting "the Court's heavy emphasis on the finality of an acquittal in *Martin Linen* and *Sanabria*").[14]

In *Kepner v. United States*, 195 U.S. 100 (1904), this Court explicitly held that the Double Jeopardy Clause bars appeals from judgments of acquittal. *Kepner* presented the question whether the government could appeal a judgment of acquittal from a Philippine "court of first instance" (vested with "original jurisdiction") to the Supreme Court of the Philippine Islands (vested with "appellate jurisdiction" and limited to reviewing a "record" that was "forwarded" to it from below). *See id.* at 112-

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[14] Although *Ball* itself involved a verdict of acquittal, subsequent decisions have confirmed that the same principles apply to judgments. *See, e.g., Sanabria*, 437 U.S. at 77 ("judgment of acquittal" is "final and unreviewable"); *Martin Linen Supply Co.*, 430 U.S. at 573 ("Rule 29 recognizes no 'legal distinction' between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause"); *Sisson*, 399 U.S. at 290 (distinction between verdict and judgment "does not support a legal distinction . . . for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29").

15. Applying *Ball*, the Court squarely held that the defendant was impermissibly "put in jeopardy a second time by the appellate proceedings." *Id.* at 111. *See also id.* at 133 ("to try [the defendant] again upon the merits, *even in an appellate court*, is to put him a second time in jeopardy for the same offense" (emphasis added)). The Court rejected the government's argument that jeopardy was "not complete until the appellate court has pronounced judgment" (*id.* at 109), rejected Spanish legal principles under which "a person was not regarded as being in jeopardy in the legal sense until there has been a final judgment in the court of last resort" (*id.* at 121), and rejected Justice Holmes' position, argued in dissent, that "[t]he jeopardy is one continuing jeopardy from its beginning to the end of the cause" (*id.* at 134).[15]

More recently, this Court similarly has held that district court sufficiency determinations, like the one at issue here, terminate jeopardy. "[A] judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an aquittal for purposes of the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986). *Accord, e.g., Richardson v. United States*, 468 U.S. 317, 325 n.5 (1984) ("Of course, a trial court's finding of insufficient evidence also is the equivalent of an acquittal"); *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981). And "[a]cquittals, unlike convictions, terminate the initial jeopardy." *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984). *Accord, e.g., Smalis*, 476 U.S. at 145 (quoting *Lydon*); *Richardson*, 468 U.S. at 325 (Double Jeopardy Clause applies "if there has been some event, such as an acquittal, which terminates

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[15] *Kepner* was decided under a statutory double jeopardy provision applied to the Philippine Islands by Congress. The text of the statute was essentially identical to the text of the Double Jeopardy Clause, *compare* 195 U.S. at 117 ("no person for the same offence shall be twice put in jeopardy") *with* U.S. Const. Amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy"), and the Court held explicitly that federal constitutional principles governed its proper construction. *See* 195 U.S. at 125-34.

the original jeopardy"); *Martin Linen Supply Co.*, 430 U.S. at 575-76 (government appeal improper because "[a] Rule 29 acquittal . . . plainly concludes a pending prosecution in which jeopardy has attached");[16] *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam) (government appeal improper because jeopardy "terminated with the entry of a final judgment of acquittal"). These propositions are controlling and dispositive here.

This Court should grant certiorari to address the conflict between the decision below and *Ball*, *Kepner* and these numerous other decisions.

B. *Wilson* Did Not Authorize Appeals From Fact-Based Acquittals Resting On A Failure Of Proof At Trial

In approving government appeals from judgments of acquittal entered after guilty verdicts, the court of appeals relied heavily on this Court's decision in *United States v. Wilson*, 420 U.S. 332 (1975). *See Forcellati*, 610 F.2d at 29. In *Wilson*, this Court held that the Double Jeopardy Clause permitted the government to appeal the dismissal of an indictment, following a jury verdict of guilty, on the ground of impermissible delay. *See* 420 U.S. at 333. The Court reasoned that the appeal was permissible because a reversal would simply reinstate the verdict, and thus "would not subject the defendant to a second trial." *See id.* at 344. The court of appeals erred, however, in concluding that this rationale controls *fact*-based judgments of acquittal, which rest not on any ruling of law, but on a failure of proof at trial.

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[16] On its facts, *Martin Linen* involved an acquittal rendered prior to a jury verdict. The Court's analysis, however, makes clear that the "constitutional significance of a Rule 29 judgment of acquittal" does not depend "on a matter of timing." 430 U.S. at 574. *See also Sorola v. Texas*, 493 U.S. 1005, 1009 (1989) (Brennan, J., dissenting from denial of certiorari) (noting that *Martin Linen* recognized "no difference for double jeopardy purposes between entry of judgment of acquittal before or after submission to jury").

By its terms, the holding in *Wilson* is limited to *legal* determinations. *See, e.g., id.* at 345 ("a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial"); *id.* at 352 (appeal permissible if "[c]orrection of an error of law" would not "grant the prosecutor a new trial"). To be sure, *Wilson* does contain sweeping language about the general significance of a second *trial* (*id.* at 342), and the irrelevance about whether the dismissal at issue constituted an "acquittal" (*id.* at 336). But while the dismissal in *Wilson* might have constituted an "acquittal" in the broad sense that the district court "relied to some degree on evidence presented at trial" (*id.* at 345), it plainly did not constitute an "acquittal" in the constitutional sense of a "resolution" of "some or all of the factual elements of the offense charged" (*Martin Linen Supply Co.*, 430 U.S. at 571). *Wilson* does not control such constitutional acquittals.

The significance of *Wilson*'s "second trial" principle is clearly limited. In many contexts where a judgment of acquittal is not present, the Double Jeopardy Clause permits a "second trial." *See, e.g., Richardson*, 468 U.S. at 322-26 (retrial after hung jury); *Lydon*, 466 U.S. at 308-09 (retrial after successful appeal by defendant); *Arizona v. Washington*, 434 U.S. 497 (1978) (retrial after government obtains mistrial for "manifest necessity"); *United States v. Dinitz*, 424 U.S. 600 (1976) (retrial after defendant obtains mistrial absent prosecutorial overreaching); *Scott*, 437 U.S. at 99 (retrial after defendant obtains dismissal of indictment "on a basis unrelated to factual guilt or innocence").

On the other hand, this Court repeatedly has confirmed, after *Wilson*, the special significance for double jeopardy purposes of *fact*-based judgments for the defendant (i.e., acquittals). In *Burks*, for example, the Court held that while the reversal of a conviction based on a legal error does not terminate jeopardy, the reversal of a conviction based on a failure of proof does. *See* 437 U.S. at 14-19. In so doing, the Court stressed repeatedly the importance, for double jeopardy purposes, of "distinguish[ing] between reversals due to trial error and those resulting from evidentiary insufficiency." *Id.* at 14-15. The same distinction

retains force in assessing the finality, for double jeopardy purposes, of district court judgments of acquittal. *See, e.g.*, *Lydon*, 466 U.S. at 308 ("Acquittals . . . terminate the initial jeopardy."); *Tibbs*, 457 U.S. at 41 ("the Double Jeopardy Clause attaches special weight to judgments of acquittal").[17]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY G. KATSAS
GREGORY A. CASTANIAS
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

October 24, 1995

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[17] Citing the breadth of dicta in *Wilson*, three prominent commentators have suggested that there is "uncertainty" under current law "surrounding appeal from a fact-based acquittal following conviction by a jury." 15B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3919.5, at 676, 687 (2d ed. 1992). Even assuming that the *Wilson* dicta could cast into doubt the century-old rule announced in *Ball*, and the explicit holding of this Court in *Kepner*, that "uncertainty" alone, regarding the continued vitality of "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence" (*Martin Linen Supply Co.*, 430 U.S. at 571), plainly would warrant this Court's review.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

ANTHONY G. OLBRES AND SHIRLEY A. OLBRES, Defendants, Appellees.

No. 94-2123.

Decided July 26, 1995.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and CYR, Circuit Judge.

SELYA, Circuit Judge.

In 1989, an employee of the Internal Revenue Service (IRS) noticed a Rolls Royce belonging to the defendants, Anthony and Shirley Olbres, parked outside a restaurant in Exeter, New Hampshire. The presence of so opulent a vehicle in so bucolic a setting piqued the taxman's interest. He initiated an investigation that led, in succession, to an audit, an indictment, a trial, and a conviction for income tax evasion pursuant to a jury verdict.[1] The district court then trumped the jury's verdict, granting the defendants' motions for judgments of acquittal. *See United States*

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[1] The statute of conviction provides in relevant part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by [the Internal Revenue Code] or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . .

26 U.S.C. § 7201 (1988).

v. Olbres, 881 F.Supp. 703 (D.N.H. 1994).[2] The government appeals. We reinstate the convictions.

I. BACKGROUND

We start by relating certain (essentially uncontradicted) facts that serve to put the appeal into initial perspective. In 1974, the Olbreses—he an industrial designer, she a schoolteacher destined to become a self-taught bookkeeper-launched a proprietorship, Design Consultants (DC), to conceive, construct, and erect exhibit booths for trade shows. At first, the proprietors comprised the entire work force. The business grew steadily, and by 1987 DC employed 23 persons and had revenues in excess of $1,900,000. Despite the phenomenal growth of the business, Shirley Olbres continued to handle the books, toiling part-time, mostly at home. Her working materials consisted of an invoice log (in which she recorded bills sent and payments received), and three journals reflecting, respectively, cash receipts, cash disbursements, and petty cash.

Beginning in 1976, the defendants retained the services of an accountant, Wilson Dennett, Dennett compiled income tax returns and financial statements, but did not perform bookkeeping or kindred services. He prepared the tax returns in reliance on information supplied by the defendants. For the tax year at issue on this appeal—1987—Shirley Olbres drafted a summary of the defendants' books and records for Dennett's use. She and her husband then met with Dennett to answer questions. When Dennett completed the return, the defendants came to his office and signed it.

The defendants maintained various bank accounts during 1987. These included business checking and savings accounts at Indian Head Bank (IHB). Defendants deposited most of their business receipts into the business checking account, but occasionally

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[2] *See also Olbres v. I.R.S.*, 837 F.Supp. 20 (D.N.H. 1993) (upholding jeopardy assessment against defendants for past-due income tax, penalties, and interest).

deposited business receipts into the business savings account. While Shirley Olbres recorded all sums deposited into the business checking account in the cash receipts journal, she did not make comparable entries showing deposits made to the business savings account. During the same time frame, the defendants also maintained payroll and petty cash accounts as a second bank, and a rent-receipts account in the name of Seabrook Properties at yet a third financial institution.

The IRS started its investigation into the defendants' tax returns in 1989. Revenue Agent Leonard Kaply pulled the laboring oar. He determined, *inter alia,* that the defendants had substantially underreported their income on their joint federal income tax returns for the years 1986 through 1988. For 1987, Kaply's audit indicated that the defendants had failed to report nearly $750,000 in income from three sources: (1) business receipts deposited directly into the business savings account and not recorded in the cash receipts journal; (2) rebates from a transportation company, that had contracted with DC to move trade show booths from place to place;[3] and (3) certain income from rental property. In the course of the audit, the defendants gave Agent Kaply the cash receipts journal, but claimed to have misplaced the invoice log and the passbook for the business savings account (either of which would have revealed much of the unreported income). It was only when the IRS issued a summons to IHB that it discovered the business savings account, with its trove of unreported funds.

The IRS concluded that the defendants willfully failed to report substantial amounts of income on their 1986, 1987, and 1988 federal tax returns ($150,954 in 1986, $748,991 in 1987, and $175,432 in 1988). The defendants conceded the underreporting, but denied criminal responsibility, saying that they lacked any

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[3] For no easily explicable reason, these rebates had been deposited into the Seabrook Properties account, omitted from the summary prepared by Mrs. Olbres for Dennett's use, and not mentioned in the defendants' ensuing dialogue with Dennett.

intent to defraud.[4] A federal grand jury returned a three-count indictment charging the defendants with willfully attempting to evade income tax for those three years. The case was tried to a jury. The defendants moved for judgments of acquittal at the end of the government's case, and again when both sides had rested. *See* Fed. R.Crim.P. 29(a). The district court denied the first set of motions and reserved decision on the second set. *See* Fed.R.Crim.P. 29(b). On January 24, 1994, the jury reached a split decision: it found the defendants not guilty on count 1 (1986) and count 3 (1988), but guilty on count 2 (1987).

After a gestation period of nearly nine months, the district court, acting in pursuance of the earlier Rule 29(b) reservation, granted the defendants' motions for judgments of acquittal on count 2. The government then filed this timely appeal.

II. ANALYSIS

Our analysis of this case is partitioned into three segments. First, we limn the standard of review. Second, we examine the elements of the offense of conviction and the sufficiency of the evidence. Third, we explain why we find the district court's analysis unpersuasive.

A. Standard of Review.

Expressing the standard for judicial review of a claim of evidentiary insufficiency in a criminal case is a straightforward exercise. If the evidence presented, taken in the light most flattering to the prosecution, together with all reasonable inferences favorable to it, permits a rational jury to find each essential element of the crime charged beyond a reasonable doubt, then the evidence is legally sufficient. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Gifford,* 17 F.3d 462, 467 (1st Cir. 1994);

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[4] The defendants placed much of the onus on their accountant, Dennett, who died prior to the trial. For the most part, his knowledge of the facts died with him.

United States v. Castro-Lara, 970 F.2d 976, 979 (1st Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2935, 124 L.Ed.2d 684 (1993). In evaluating sufficiency, both direct and circumstantial evidence are accorded weight. *See, e.g., United States v. O'Brien*, 14 F.3d 703, 706 (1st Cir. 1994). So long as the evidence, taken as a whole, warrants a judgment of conviction, "it need not rule out other hypotheses more congenial to a finding of innocence." *Gifford*, 17 F.3d at 467.

When, as now, a criminal defendant mounts a sufficiency challenge, all of the evidence, direct and circumstantial, is to be viewed from the government's coign of vantage. Thus, the trial judge must resolve all evidentiary conflicts and credibility questions in the prosecution's favor; and, moreover, as among competing inferences, two or more of which are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt. *See United States v. Taylor*, 54 F.3d 967, 974 (1st Cir. 1995); *United States v. Rothrock*, 806 F.2d 318, 320 (1st Cir. 1986).

The granting of a motion for judgment of acquittal is subject to *de novo* review. *See United States v. Kirvan*, 997 F.2d 963, 967 (1st Cir. 1993). Like the trial court, "we scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt." *Taylor*, 54 F.3d at 974.

B. Sufficiency of the Evidence.

In this instance, our assignment is simplified. Because the defendants do not dispute that they signed the 1987 tax return and that they substantially understated their income in the process, the question of guilt reduces to whether the underreporting occurred willfully, that is, whether it constituted "a voluntary, intentional violation of a known legal duty," *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976) (per curiam) (citations omitted). The trial focused on this narrow issue. The government contended that the defendants deliberately understated their 1987 income, while the defendants—who

claimed to have signed the return without reading it—contended that they were guilty only of inadvertence, aggravated by the hiring of a maladroit accountant.

In a tax evasion case in which the defendants assert that blind reliance on their accountant, not criminal intent, caused an underreporting, the critical datum is not whether the defendants ordered the accountant to falsify the return, but, rather, whether the defendants knew when they signed the return that it understated their income. *See Rothrock*, 806 F.2d at 321. So here: if the evidence introduced at trial, *taken in a pro-government light*, permitted the jury to infer that the defendants (a) were aware of the contents of their return, and (b) knew that their reportable income significantly exceeded the income reflected therein, then the jury lawfully could find that the defendants acted willfully, and, hence, violated 26 U.S.C. § 7201. *See, e.g., United States v. Gaines*, 690 F.2d 849, 855 (11th Cir. 1982). We turn to this two-part inquiry, and then buttress the results with additional evidence of willfulness.

1. **Knowledge of the Return's Contents.** This facet of the inquiry need not occupy us for long. A jury may permissibly infer that a taxpayer read his return and knew its contents from the bare fact that he signed it. *See United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982) (holding that the defendant's signature on his return sufficed to establish knowledge of incorrect contents); *United States v. Romanow*, 505 F.2d 813, 814 (1st Cir. 1974) (dismissing taxpayer's denial that he had read tax form, and stating that "it is clear that a jury could disbelieve him and conclude from nothing more than the presence of his uncontested signature that he had in fact read" the document).

Here, moreover, the jury had before it other circumstantial evidence indicating that the defendants knew the contents of their return. Dennett's wife, who worked with him, testified that when Dennett prepared a tax return for signature, the return was bundled into a packet with a cover sheet that summarized its contents. The bottom portion of the cover sheet contained the bill for the tax preparation services. The defendants testified that it

was their habit to go to Dennett's office, sign the completed return, and pay the bill. The jury could reasonably infer that, in order to have paid the accountant's bill, the defendants must have read the portion of the cover sheet that detailed the return's contents.

2. Knowledge of the Understatement. The most compelling proof that the defendants knew that the figure reported on their 1987 return substantially understated their true income is the product of simple arithmetic. Tama Mitchell, a government witness, analyzed the defendants' 1987 return and found that the disposable funds available to them in that year, based on the information contained in the return, totalled $24,695. Mitchell further testified that the defendants made expenditures of more than $620,656 during the year.[5] In the same period, their overall savings increased by $334,003. After subtracting net deposits of loan proceeds, Mitchell's analysis demonstrated that the defendants' combined expenditures and accretions to savings in 1987 exceeded the cash available to them, according to their tax return, by $580,989.

To be sure, the evidence pertaining to the defendants' lavish spending is circumstantial and suggestive, not direct and irrefutable. Yet, the arithmetic furnishes a sturdy infrastructure capable of supporting a reasonable inference that the defendants must have been aware that their 1987 return substantially underreported their income. *See O'Brien*, 14 F.3d at 706-07 (holding that, despite an absence of direct evidence, circumstantial evidence adequately supported jury's inference of guilty knowledge in fraud case); *Castro-Lara*, 970 F.2d at 981 (explaining that "circumstantial evidence, in and of itself, is often

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[5] Mitchell's computations did not include all the defendants' annual expenditures, but established a baseline by concentrating on major cash purchases during the year, *e.g.*, an outlay of $158,000 in June to purchase a Rolls Royce Corniche convertible; an outlay of $32,450 in August to purchase a Range Rover; and an infusion of roughly $140,000 to a brokerage account.

enough to ground a conviction"); *United States v. Hurley*, 957 F.2d 1, 4 (1st Cir.) (stating that, in proving tax evasion, "the government [does] not need to show direct evidence of tax motivation" so long as the jury has a sufficient circumstantial basis for inferring willfulness), *cert. denied*, ___ U.S. ___, 113 S.Ct. 60, 121 L.Ed.2d 28 (1992). Even if one were to accept the defendants' self-serving hypothesis that the accountant's incompetence sparked the myriad misstatements embedded in the return, the jury could still reasonably infer that, when the defendants signed the return, they must have gained an awareness that the numbers could not possibly be accurate. *See Gaines*, 690 F.2d at 855 (holding that glaring inaccuracies in figures can support a reasonable inference of knowledge); *see also Drape*, 668 F.2d at 26 ("Intent may be established where a taxpayer 'chooses to keep himself uninformed as to the full extent that [the return] is insufficient.'") (quoting *Katz v. United States*, 321 F.2d 7, 10 (1st Cir.), *cert. denied*, 375 U.S. 903, 84 S.Ct. 193, 11 L.Ed.2d 144 (1963)).

The proposition that the defendants knew their return understated their income derives support from other evidence as well. For example, during 1986, Anthony Olbres (who had unrestricted access to DC's books and records) provided fiscal and marketing information to Dennett so that the latter could prepare a financial statement in connection with a prospective sale of the business. When completed, the financial statement projected 1987 revenues in the amount of $1,976,000. The projection proved to be prophetic—DC's actual 1987 gross receipts totalled $2,014,059—but the defendants reported gross receipts on the 1987 tax return in a far smaller amount ($1,265,069). Based on this progression of events, a rational jury could plausibly infer that Anthony Olbres had sufficient knowledge of DC's financial matters to recognize the hugh discrepancy between projected revenues and reported revenues,

and to appreciate the significance of the gap.[6] Likewise, the jury could infer from Shirley Olbres' position as DC's bookkeeper that she, too, must have recognized the massive understatement of income.

3. Other Evidence of Willfulness. In this case, the jury heard other evidence capable of supporting a permissible inference that the defendants acted willfully in underreporting their income. For one thing, the defendants themselves from time to time bypassed their business checking account and deposited substantial amounts of money (including approximately $145,000 in payments from a single customer, Digital Equipment Corp.) directly into their business savings account. They knew that these payments constituted income, yet they neither recorded them in the cash receipts journal nor reported them on their 1987 tax return. To make matters worse, the two source materials that most easily could have identified the unreported income—the invoice log and the passbook for the business savings account—were withheld from the defendants' accountant; and, coincidentally, the same source materials conveniently disappeared during the IRS audit.[7] While the defendants maintained other books and records from which the existence of these funds could

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[6] The district court suggested that Anthony Olbres' participation in the preparation of the 1987 projections tended to be exculpatory rather than incriminatory, because it showed that the defendants reposed great confidence in their accountant. *See Olbres*, 881 F. Supp. at 715. Though such an inference may be permissible, it is not compelled; and, given the method of Rule 29, it is the jury's choice between alternative inferences, not the trial judge's choice, that must control. *See O'Brien*, 14 F.3d at 707 (warning that judges must not "usurp the jury's province" of choosing between alternative inferences); *United States v. Guerrero-Guerrero*, 776 F.2d 1071, 1075 (1st Cir. 1985) (similar), *cert. denied*, 475 U.S. 1029, 106 S.Ct. 1233, 89 L.Ed.2d 342 (1986).

[7] Joyce Wildes, a Dennett employee assigned to review the defendants' taxes, testified that she was not provided with either the log or the passbook, and Agent Kaply discovered the existence of the business savings account only by obtaining information directly from IHB.

perhaps be gleaned, *see Olbres*, 81 F. Supp. at 715, it is readily evident that a jury plausibly could infer from these facts that the defendant clumsily attempted to conceal income from both their tax preparer and their government.

Of course, the defendants' counter-argument—that the evidence indicates nothing more than that they were remarkably slipshod in their business practices—is also plausible. Withal, the option to choose between these inferences belonged to the jury, not the judge, *see United States v. Guerrero-Guerrero*, 776 F.2d 1071, 1075 (1st Cir. 1985), *cert. denied*, 475 U.S. 1029, 106 S.Ct. 1233, 89 L.Ed.2d 342 (1986), and the jury had a perfect right to reject the defendants' counter-argument and draw the inference urged by the government. *See O'Brien*, 14 F.3d at 707; *United States v. Quejada-Zurique*, 708 F.2d 857, 859 (1st Cir.), *cert. denied*, 464 U.S. 855, 104 S.Ct. 173, 78 L.Ed.2d 156 (1983). After all, "if the evidence can be construed in various reasonable alternatives, the jury is entitled to freely choose from among them." *United States v. Smith*, 680 F.2d 255, 259 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110, 103 S.Ct. 738, 74 L.Ed.2d 960 (1983).

The evidence anent the defendants' income from rental property also bolstered the inference of willfulness. During 1987, the defendants owned various properties and rented them to tenants. In 1987, Johnson Matthey Catalog Company (J/M) rented space from the defendants in Seabrook, New Hampshire, at a rate of $48,000 per annum. J/M sent a $4,000 rent check to the defendants' home every month. Shirley Olbres deposited each rent check, when received, into the Seabrook Properties account. Although J/M paid the full $48,000 during 1987, the defendants informed Dennett that they had garnered only $30,000 in rental income from all their real estate. Thus, their 1987 return failed to include $18,000 from the avails of the J/M tenancy, and also failed to include $3,890 in rental income referable to a property known as "the barn." It is beyond serious question that the defendants' action in pegging the J/M lease proceeds at $30,000 in the summary they gave to their accountant, coupled with their

failure to list *any* rental income referable to the barn, could ground the requisite inference of criminal intent.

We think, too, that the defendants' failure to report sums received as rebates from Mayflower Transit Company (Mayflower) gives rise to a founded inference of willfulness. DC retained Mayflower to ferry exhibit booths to and from trade shows. The contract between the parties stipulated that Mayflower would furnish transportation services to DC at customary tariff rates, but then remit 20% of the amounts actually paid. The rebate would be calculated monthly, based on payments from DC to Mayflower. Pursuant to this arrangement, Mayflower transmitted $96,671 in 1987, but, for some reason, failed to issue a 1099 form memorializing the payments. The defendants did not report any of this money as income on their 1987 return (despite the fact that they deducted 100% of the tariff charges that they paid in the first instance).

Shirley Olbres deposited each of the eleven rebate checks that DC received from Mayflower during the year into the Seabrook Properties account even though that account had no direct connection with DC or its business. At trial, she testified that she did not know that the rebates constituted income. Her husband, however, admitted that he was aware of the rebates' taxable character. We believe that, on this record, a rational jury could infer that the concealment of the rebates resulted not from ignorance or inadvertence but from a conscious decision on the defendants' part to take criminal advantage of Mayflower's failure to issue the required 1099 form.

4. Recapitulation. To sum up, the record, read favorably to the verdict, supports the following findings: (1) the defendants signed the 1987 tax return; (2) they knew the contents of the return at the time they signed it, and they knew that it significantly understated their taxable income; (3) they knew their business had made substantially more money than the return reflected; (4) they had received revenues during the tax year which they knew were taxable, such as business receipts and transportation rebates, yet they neither deposited those revenues

in the business checking account nor recorded their receipt in the usual manner, but, instead, diverted the revenues to other bank accounts; (5) they deliberately understated the amounts of rental income received when transmitting data to their accountant preliminary to the accountant's preparation of their tax return; and (6) they withheld materials from the accountant (and, later, from the IRS auditor) that would have pointed to the existence and extent of the undeclared income. Notwithstanding the defendants' denials and regardless of the exculpatory evidence that lurked in the record, these findings enabled a rational jury to conclude, beyond a reasonable doubt, that the defendants were guilty of income tax evasion for the year 1987.

C. The Judgment of Acquittal.

The district court, steadfast in its desire to ensure the integrity of the reasonable doubt standard, undertook a painstakingly thorough examination of the record. The court conceded that the government's case was not "unpersuasive," *Olbres*, 881 F. Supp. at 716, that a jury "could *rationally* reach" the conclusion that the defendants willfully attempted to defraud the government in respect to their 1987 taxes, *id.*, and that, if the court were to determine the existence of willfulness by means of a preponderance test, it would find for the government, *see id.* at 717. Nevertheless, the court entered judgment notwithstanding the verdict on the ground that the proof did not permit a finding, beyond a reasonable doubt, that the defendants willfully filed a false tax return. To the court's way of thinking, the defendants had articulated a "hypothesis of innocence (negligence, incompetence, inattention, and reasonable reliance on the family's long-time certified public accountant) . . . [that was] sufficiently reasonable and sufficiently strong and sufficiently credible that a rational trier of fact . . . must necessarily entertain a reasonable doubt about defendants' guilt. . . ." *Id.*

Our independent review of the record convinces us that the court, while giving lip service to the "viewpoint" principle (which holds that the evidence must be reviewed, for the purpose of an acquittal motion, in the light most flattering to the government),

subverted the principle by isolating each piece of evidence and determining whether that evidence, standing alone, gave rise to a powerful enough inference of willfulness to allay any reasonable doubt about the defendants' guilt. In the bargain, the court appears to have misunderstood the interplay between the viewpoint principle and the reasonable doubt standard.

The lower court's handling of the rent-receipts evidence illustrates our concerns. In discussing this evidence, the court acknowledged that an inference adverse to the defendants could rationally be drawn, but concluded that this inference was not "of sufficient persuasive value to establish [the defendants'] knowing intent to evade taxes, beyond a reasonable doubt." *Id.* at 716. But few, if any, circumstantial evidence cases can survive this sort of balkanization. For purposes of Rule 29, a broader perspective must be employed to gauge the prosecution's mettle. Under the viewpoint principle, a jury charged with determining an accused's guilt or innocence is entitled to consider the evidence as a seamless whole. Jurors are "not required to examine the evidence in isolation, for 'individual pieces of evidence, insufficient to themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.'" *United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992) (quoting *Bourjaily v. United States*, 483 U.S. 171, 179-80, 107 S.Ct. 2775, 2780-81, 97 L.Ed.2d 144 (1987)), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1005, 122 L.Ed.2d 154 (1993). Here, though no one piece of evidence laid bare the defendants' intent, the aggregate evidence, taken most hospitably to the prosecution (as the viewpoint principle demands), was equal to the task.

The lower court's treatment of the evidence anent transportation rebates illustrates another (related) shortcoming in the court's inchmeal approach to evidentiary sufficiency: the court not only took each piece of evidence in isolation, but weighted the several possible inferences associated with each piece, and chose between them. Thus, while the judge acknowledged that the jury could rationally infer criminal intent in connection with Shirley Olbres' handling of the transportation

rebates,[8] he posited that Mrs. Olbres, as an "unschooled lay person," might well have misconstrued the rebates as something other than income. *Olbres*, 881 F.Supp. at 716. By umpiring the duel between two competing inferences and declaring the winner on the basis of which inference appeared more robust in his eyes, the judge invaded the jury's province.

On a motion for judgment of acquittal—unlike, say, on a motion for a new trial[9]—it is for the jury, not the court, to choose between conflicting inferences. In *Jackson*, the Supreme Court stated that a court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." 443 U.S. at 326, 99 S.Ct. at 2793. Under this directive, the judge's failure to defer to the permissible inference of willfulness arising out of, *inter alia*, the defendants' failure to report the rebate checks constitutes error.

There is still another aspect of the district court's methodology that bears correction. In finding the proof insufficient to convict, the court cited, and relied upon, a statement to the effect "that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt." *United States v. Bell*, 678 F.2d 547, 550 (5th Cir. 1982) (en banc) (Anderson, J., concurring) (internal citation and quotation marks omitted), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

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[8] The district court conceded that the evidence could sustain an inference that Shirley Olbres knew the rebate checks were taxable income, but attempted to hide them, thereby taking advantage of Mayflower's failure to report the payments to the IRS on the required form. *See Olbres*, 881 F.Supp. at 716.

[9] The defendants did not move for a new trial in this case.

Even apart from a citation error,[10] this stripped-down formulation, without more, comprises a misleading statement of the law. Its principal vice is that it is incomplete. The quoted text fails to reflect a core element of the viewpoint principle: the necessity of drawing inferences hospitable to the government's theory of the case *before* judging the strength of any proffered hypothesis of innocence. We explain briefly.

In analyzing a motion for judgment of acquittal, a court is obliged to take, and then to scrutinize, a snapshot of the case—but, as we have made clear on other occasions,[11] the snapshot only can be taken after focusing the lens of inquiry at an angle favorable to the prosecution. The district court neglected this focus. It took the snapshot head-on (as a judge would do if presiding over a bench trial). Consequently, the court acknowledged that inferences of willfulness could plausibly be drawn from much of the evidence, but, instead of crediting those inferences and then confronting the question of evidentiary sufficiency, the court simply placed the inculpatory inferences on an equal footing with various exculpatory inferences and proceeded to weigh this mixed bag. In other words, the court neither deferred to the jury's presumed choice of alternative

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[10] The district court incorrectly attributed this language to the *Bell* majority. *See Olbres*, 881 F.Supp. at 711.

[11] *See, e.g., United States v. Flores-Rivera*, 56 F.3d 319 (1st Cir. 1995):

> [I]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because. . . where an equal or nearly equal theory of guilt and a theory of evidence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury must necessarily entertain a reasonable doubt.

Id. at 323 (quoting *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 330, 121 L.Ed.2d 248 (1992)).

inferences, *see Jackson*, 443 U.S. at 326, 99 S.Ct. at 2792-93, nor evaluated the potency of the defendants' hypothesis of innocence *in light of those presumed choices*. This improper focus emptied the viewpoint principle of its essential meaning (causing the court to usurp the jury's function) and produced a snapshot that distorted, rather than accurately depicted, the Rule 29 record.

III. CONCLUSION

We need go no further. It is trite, but true, that a court "ought not disturb, on the ground of insufficient evidence, a jury verdict that is supported by a plausible rendition of the record." *Ortiz*, 966 F.2d at 711. While there may well be cases in which the government's proof founders in the "realm between preponderance and 'beyond reasonable doubt,'" *Olbres*, 881 F.Supp. at 712, *see also* Hon. Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L.Rev. 979, 986-88 (1993) (criticizing the perceived toothlessness of appellate application of the reasonable doubt standard in review of evidentiary insufficiency claims), this case is not of that genre. To the contrary, this case evokes our frequently reiterated rule that:

> [I]n a criminal case, "the evidence need not preclude every reasonable hypothesis inconsistent with guilt" in order to sustain a conviction. It is enough that...a rational jury could look objectively at the proof and supportably conclude beyond reasonable doubt that the defendant's guilt had been established.

United States v. Ingraham, 832 F.2d 229, 239-40 (1st Cir. 1987) (internal citation omitted), *cert. denied*, 486 U.S. 1009, 108 S.Ct. 1738, 100 L.Ed.2d 202 (1988). Because our perscrutation of the record convinces us that, in mulling the issue of intent, the district court both misapplied the appropriate legal standard and undervalued the force of the government's overall proof, the judgment below must be

Reversed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA

v.

ANTHONY G. OLBRES AND SHIRLEY A. OLBRES.

Cr. No. 93-27-1-2-M.

Sept. 30, 1994.

MEMORANDUM ORDER

McAULIFFE, District Judge.

This close and difficult case raises fundamental issues about the nature of the court's role in insuring that criminal convictions are obtained only upon proof beyond a reasonable doubt of each essential element of the crime charged.

Defendants Anthony and Shirley Olbres were indicted on three counts of willful income tax evasion related to tax years 1986, 1987, and 1988. 26 U.S.C. § 7201. After seven days of trial and three days of deliberation, the jury declared itself deadlocked. Over defense objections, the court delivered a modified *Allen* charge,[1] urging the jury to continue its deliberations in an effort to reach a verdict. The jury then retired for the weekend and returned a verdict on each count the following Monday, the fourth day of deliberations. The jury acquitted defendants on Counts I and III of the indictment, relating to tax years 1986 and 1988, but convicted both defendants on Count II, relating to tax year 1987.

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[1] The modified *Allen* charge was drawn from that approved in *United States v. Nichols*, 820 F.2d 508, 511 (1st Cir. 1987). *See also Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

At the close of all the evidence, and before the case was submitted to the jury, defendants moved for judgment of acquittal on all three counts on grounds that the evidence was insufficient as a matter of law to establish their guilt beyond a reasonable doubt. *See* Fed.R.Crim.P. 29(a). The court reserved its decision on the motion until after the verdict. *See* Fed.R.Crim.P. 29(b). On March 22, 1994, the court heard oral argument on the motion and granted the parties leave to file supplemental memoranda.

The difficulty presented by this case stems in part from the inexact nature of judicial review of insufficiency of evidence claims, and in part from the fact that such review unavoidably includes a subjective component. In considering an insufficiency claim, a court is called upon to decide whether the evidence is adequate, as a matter of law, to meet a subjective standard of persuasion. That assessment is itself partially subjective, and, because it is partially subjective, it will, in close cases, yield conclusions about which reasonable judicial minds might differ.

In this case, the only disputed element of the crime of conviction was "willfulness." As demonstrated in the government's post-trial memoranda, its case for willfulness was neither frivolous nor wholly unpersuasive. Thus, the critical Rule 29 inquiry here is not whether evidence was presented from which willfulness could be inferred; it could. Instead, the critical inquiry here is whether a reasonable jury could infer willfulness from the evidence presented to the *requisite degree of certitude* necessary to support a conviction. Subsumed in that inquiry is a basic issue related to the means properly used by a trial judge to measure circumstantial or inferential evidence to determine whether it is of sufficient persuasive force to prove a necessary fact "beyond a reasonable doubt." Those questions provide the focus of discussion.

At the outset, however, it must be noted that, as difficult as it might be to draw and enforce inexact distinctions among varying degrees of certitude, a defendant's constitutional due process right not to be convicted except upon proof legally sufficient to establish each element of the crime charged "beyond a reasonable

doubt" compels judges to do exactly that. In this case, albeit a close one, the government's proof must be deemed to fall short, as a matter of law, of the persuasive value required to permit a reasonable jury to find the element of willfulness beyond a reasonable doubt.

DISCUSSION

I. Count II: Tax Evasion

To prove the crime described in Count II, violation of 26 U.S.C. § 7201,[2] the government was required to prove the following essential elements beyond a reasonable doubt: (1) the existence of a substantial tax deficiency; (2) an affirmative act constituting an evasion or attempted evasion of the tax; and (3) willfulness. *See Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); *Spies v. United States*, 317 U.S. 492, 499-500, 63 S.Ct. 364, 368-69, 87 L.Ed. 418 (1943); *United States v. Waldeck*, 909 F.2d 555, 557 (1st Cir. 1990). Defendants conceded that they failed to pay a substantial amount of income tax in each of the three years specified in Counts I, II and III of the indictment. They also conceded that because each tax return understated their income, those returns were necessarily false. The government and defendants agreed that the only disputed issues between them were whether defendants knew the returns were false when filed and whether they, therefore, acted "willfully." Of course, the issue here is limited to the conviction on Count II (tax year 1987); the verdicts of acquittal on Counts I and III are not relevant to this ruling. *United States v. Powell*, 469 U.S. 57, 64-65, 105 S.Ct. 471, 476-77, 83 L.Ed.2d 461 (1984).

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[2] 26 U.S.C. § 7201 provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by [the Internal Revenue Code] or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . .

"Willfulness" is the "voluntary, intentional violation of a known legal duty." *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982) (citing *United States v. Pomponio*, 429 U.S. 10, 11-12, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976)); *see also, Cheek v. United States*, 498 U.S. 192, 195, 111 S.Ct. 604, 607, 112 L.Ed.2d 617 (1991); *United States v. Aitken*, 755 F.2d 188, 191 (1st Cir. 1985). Evidence of willfulness is often circumstantial, since direct proof of the required specific intent is ordinarily unavailable.

The evidence presented at trial in this case, cast in the light most favorable to the prosecution, showed the following. Defendants Anthony and Shirley Olbres are husband and wife. In 1974 they began a small business designing, fabricating, and selling trade show booths. The business, originally a small sole proprietorship, rapidly grew into a successful enterprise with gross receipts in the millions of dollars and clients among the country's major corporations. The business experienced major relative growth between 1986 and 1988.

Anthony Olbres, an industrial designer by education and profession, was responsible for the business's major design and fabrication work, most of the marketing, and its billing function. Shirley Olbres assisted in the business from its inception, but always on a part-time basis. She assumed responsibility for maintaining the financial records, while also caring for the couple's three children. Mrs. Olbres completed three years of college before her marriage, but she had neither training nor prior experience in accounting or bookkeeping. As the business grew, defendants hired employees to assist in the fabrication, administration, and marketing aspects of the enterprise. But, despite her lack of training, Shirley Olbres continued to be responsible for the company's financial records. Those records were generally sloppy and contained many errors.

Beginning in 1976, ten years before the tax year at issue, defendants retained a local certified public accountant, Wilson Dennett, to provide general business accounting and tax preparation services. Although not without some professional

deficiencies, Dennett was a competent accountant, an honest person, and was not in collusion with defendants in any way. Dennett prepared financial statements, assisted with financing transactions, provided routine accounting advice, and prepared defendants' tax returns, including the 1987 return described in Count II of the indictment. He routinely relied on information provided by Mr. and Mrs. Olbres in performing these services. He did not perform in-house bookkeeping or other record keeping functions for the business.

Defendants' 1987 joint tax return was audited by the Internal Revenue Service in 1989.[3] Agent Leonard Kaply was eventually assigned the task of conducting the audit. After routine investigation, he determined that substantial business receipts had been deposited in defendants' business accounts in 1987, but had not been properly accounted for on that year's tax return. Upon request, Mr. Dennett provided Agent Kaply with access to defendants' files and his own work papers. Meetings between the IRS and defendants were scheduled, but they proved unproductive. Bank records relating to some of defendants' accounts were not produced as requested by Agent Kaply. At some point defendants, through legal counsel, expressed a willingness to cooperate fully with the civil audit, but only on condition that IRS agree not to refer the matter to its criminal division. Agent Kaply and his superiors declined, and decided that defendants, and presumably their accountant and legal counsel, were not fully cooperating in the civil audit. The case was then referred to the criminal investigation division. Agent Kaply also testified that Dennett once stated that Anthony Olbres had acknowledged (to Dennett) a "problem" with unreported income relative to

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[3] The casual curiosity of an IRS employee apparently triggered the initial audit. While driving through Exeter, New Hampshire, the employee noticed a Rolls Royce automobile parked at the Exeter Inn. Because he thought it conspicuous that a luxury automobile should be parked in Exeter, he took down the license plate number with the intention of later identifying the owner and examining his or her tax returns. The car belonged to defendants.

defendants' 1987 return. Mr. Dennett's statement to Kaply and Mr. Olbres's statement to Dennett were both made after the audit had begun.

Defendants' 1986, 1987, and 1988 tax returns in fact under-reported their income, with the most substantial understatement occurring on the 1987 tax return. Defendants reported gross business receipts of $1,235,069, and rental income of $30,000 for 1987. The correct amounts were shown to be $1,962,170 and $51,890 respectively, resulting in a total gross income understatement of $748,991, or roughly 37%. (While much confusing testimony and argument was presented involving other comparisons—i.e. taxable income, net profit, taxes paid, etc.,—the actual issue relates to understatement of gross income; all other material tax consequences flowed from that circumstance and not from misfeasance in calculation or misapplication of correct accounting principles.)

No evidence was produced tending to show that defendants were engaged in any illicit business activities—their business was entirely legitimate and did not involve cash receipts or payments. Defendants maintained several bank accounts in four different local banks. All of the accounts were in defendants' own names, the name of their business, or the names of their rental properties. The government produced no evidence of hidden accounts, straws, offshore accounts or accounts held under pseudonyms. Defendants did maintain books and records. No double set of books was employed. No alterations of existing records were shown. No false invoices or documents were produced, but incorrect entries by Mrs. Olbres were shown (e.g. erroneously recording a customer receipt as loan proceeds). No evidence tending to show that defendants handled their business affairs in a manner designed to frustrate record keeping was produced.

Two bank accounts maintained at the Indian Head Bank—referred to at trial as the "business checking account" and

the "business savings account"[4] respectively—contained deposits from defendants' business. All monies received by the business were documented or documentable (payment by check, memorialized by Forms 1099, recorded in ledgers or as deposits on bank records, etc.).

During 1987, Mrs. Olbres maintained an invoice log which recorded all business invoices sent out and payments received. She also kept a cash receipts journal in which she recorded all business receipts deposited into their business *checking* account, but she did not keep a journal showing deposits made to their business *savings* account. The total receipts recorded in the cash receipts journal corresponded to within fifteen dollars of the deposits shown on the checking account's statements and within five thousand dollars of the amount reported as "gross receipts" by defendants on their 1987 return.

The civil audit revealed that undeclared 1987 deposits exceeding $718,000 were made to the business *savings* account and other accounts, comprised essentially of three types: A major invoice payment by Digital Equipment Corporation ($445,176.28); rebates from transportation companies who contracted to move defendants' trade show booths from place to place; and rental property income. Defendants produced the 1987 cash receipts journal for inspection during the civil audit, but claimed they could not find the invoice log for that year, or the passbook from the business savings account. Those documents were not found among their accountant's papers and were not produced at trial. Presumably, the invoice log would have shown that an invoice in the amount of $445,176.28 was sent to Digital Equipment Corporation and that Digital paid it. The bank's records confirmed that the Digital payment was

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[4] The government stipulated at trial that *in fact* the savings account was used as and was properly called the "business savings account." The business savings account was apparently used to hold funds that were not immediately necessary to meet cash flow needs, at greater interest than was available from the business checking account.

deposited in the business savings account. The other substantial amounts at issue, shipping rebates or discounts from transportation companies, were also deposited in defendants' bank accounts, but were not "invoiced." The rental receipts were paid in accordance with lease terms and they too were deposited in defendants' accounts.

Both defendants testified in their own defense. They asserted that they did not intend to file false returns and, at the time of filing, were not aware that the returns substantially understated their income. They said they necessarily relied on Mr. Dennett, their accountant and tax preparer, to ensure that the returns were properly completed and correct. Defendants stated that they did not discuss their prepared tax returns with Mr. Dennett in detail and did not review, scrutinize or even read the returns before signing them; they simply turned over their accumulated papers and records for Dennett to use, answered whatever questions he had, and signed the returns when he completed his work.

The evidence showed that while Mr. Dennett included the interest paid on the business savings account (and interest on defendants' other accounts) on their 1987 return, he failed to include as income a substantial portion of the amounts deposited in the account which actually generated that interest. The evidence also showed that the interest earned in 1987 on the business savings account was dramatically higher than it had been the year before—due of course to the substantially higher balance occasioned by the Digital and other deposits.

Mr. Dennett's accounting work papers included a financial statement he had prepared, in consultation with Mr. Olbres, which projected defendants' income for 1987. That projection had been prepared in connection with an earlier prospective sale of defendants' business. The statement showed projected 1987 income in the amount of $1,976,000, an amount nearly identical to defendants' actually realized gross income for 1987. That income projection had been filed by Dennett with the IRS as part of defendants' 1986 return the year before, albeit unnecessarily

(and inexplicably, assuming CPA Dennett was aware of the superfluity of filing it as part of the 1986 return).

The evidence also established that in 1988 defendants applied, through Mr. Dennett, for a comparatively modest refund of back taxes, including taxes paid for 1987.

The government showed that defendants were rich, not particularly generous, and tended to buy luxury items—e.g. expensive cars, yachts, private schooling for their children. The government also demonstrated that a close accounting analysis showed that defendants spent more money in 1987 than they would have had readily available according to their tax return. The inference to be drawn from that circumstance was that by the end of 1987, or certainly by the time their 1987 tax return was filed, defendants knew that the tax return was wrong, because they knew that they had spent more money than should have been available, according to the return's own figures. The government contended that the discrepancy between the 1987 calendar year's expenditures and the amounts listed on the 1987 tax return was as clear to defendants when they filed the return as it was to the government's summary accountant witness after she completed her analysis.

II. Motion For Judgment Of Acquittal

Consideration of defendants' motion begins with familiar and easily stated principles. If the evidence adduced during trial is insufficient to sustain a conviction of the offense charged, the court must enter a judgment of acquittal. Fed.R.Crim.P. 29(a). Evidence is insufficient to sustain a conviction if it cannot, as a matter of law, support a finding of guilt beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the context of a criminal jury trial, the phrase "beyond a reasonable doubt" describes the subjective state of certainty against which a jury is commanded to evaluate its conclusions regarding the evidence. The prosecution bears the burden of

persuading the jury that the evidence demonstrates guilt to the satisfaction of that subjective standard, i.e. "beyond a reasonable doubt." The role played by the reasonable doubt standard in a jury's deliberative weighing of the evidence has been characterized as follows:

> [I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead all the factfinder can acquire is a belief of what *probably* happened. The intensity of the belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

In re Winship, 397 U.S. at 370, 90 S.Ct. at 1076 (Harlan, J., concurring) (emphasis in original).

While serving as an important practical safeguard against speculative determinations by a criminal jury, the quantitatively imprecise reasonable doubt standard also serves another important purpose. It describes the constitutional measure against which a reviewing court must assess the *legal* sufficiency of the evidence to sustain a jury's conclusion of guilt. Judicial assessment of legal sufficiency must be made without regard to what a particular jury may have actually decided in a particular case. *See e.g. Jackson v. Virginia*, 443 U.S. at 317 n. 10, 99 S.Ct. at 2788 n. 10. A judge considering a motion for judgment of acquittal must independently determine whether, upon the evidence presented, a rational jury could reach the *subjective* conclusion of guilt beyond a reasonable doubt.

In deciding a Rule 29 motion, it is of course critical that a judge remain cognizant of the important difference between a

motion for judgment of acquittal and a motion for new trial under Rule 33. A Rule 29 motion challenges the legal sufficiency of the evidence, while a Rule 33 motion asks the court to determine whether, as the court perceives it, the weight of the evidence preponderates against the verdict, such that "the interest of justice" requires a new trial. *See United States v. Thornley*, 707 F.2d 622, 626 (1st Cir. 1983); Fed.R.Crim.P. 33. The Supreme Court has described the distinction as follows:

> [A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the . . . court into questions of credibility.
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> A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the . . . court sits as a "thirteenth juror" and disagrees with the jury's resolution of conflicting testimony.
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> *Tibbs v. Florida*, 457 U.S. 31, 37, 42, 102 S.Ct. 2211, 2215-16, 2218, 72L.Ed.2d 652 (1982); *see also United States v. Morales*, 902 F.2d 604, 608 (7th Cir. 1990) (granting motion for new trial but denying motion for judgment of acquittal), *amended*, 910 F.2d 467 (7th Cir. 1990).

In this case defendants did not file a Rule 33 motion, and the court is powerless to consider or grant such a motion *sua sponte*. Fed.R.Crim.P. 33 (motion for new trial based on grounds other than newly discovered evidence must be filed within seven days after verdict); *United States v. Lema*, 909F.2d 561, 565 (1st Cir. 1990) (Rule 33 motion must be filed within seven days of verdict, which time limit is jurisdictional).

The accepted test against which a court must judge legal sufficiency under Rule 29 is also familiar and easily stated. If the

evidence presented, viewed in a light most favorable to the prosecution, drawing all reasonable inferences and resolving all credibility issues in its favor, would permit a rational jury to find each essential element of the crime charged beyond a reasonable doubt, then it is legally sufficient.[5] *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789. *See In re Winship*, 397 U.S. at 364, 90S.Ct. at 1072-73; *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir. 1994); *United States v. Sepulveda*, 15 F.3d 1161, 1173 (1st Cir. 1993); *United States v. Mena-Robles*, 4 F.3d 1026, 1031 (1st Cir. 1993); *United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992). In addition, "[s]o long as the evidence, taken as a whole, supports the judgment of conviction, it need not rule out other hypotheses more congenial to a finding of innocence." *Gifford, supra*, at 467, *citing United States v. Victoria-Peguero*, 920 F.2d 77, 86-87 (1st Cir. 1990), *cert. denied*, 500 U.S. 932, 111 S.Ct. 2053, 114 L.Ed.2d 458 (1991).

Legal sufficiency does not turn on whether the presiding judge personally believes that the evidence establishes guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 318-19, 99 S.Ct. at 2788-89. Indeed, in the context of Rule 29, a judge must scrupulously avoid weighing the evidence as a "thirteenth juror," and must resolve all evidentiary conflicts and inferences, particularly questions of credibility, in favor of the government.

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[5] In this circuit, references to "a rational jury" or "a reasonable jury" appear to be used interchangeably with "any rational trier of fact" or "any rational juror." *See, e.g., United States v. Loder*, 23 F.3d 586 (1st Cir. 1994); *United States v. Torres-Malonado*, 14 F.3d 95, 100 (1st Cir. 1994); *United States v. Monteiro*, 871 F.2d 204, 211 (1st Cir. 1989), *cert. denied*, 493 U.S. 833, 110 S.Ct. 108, 107 L.Ed.2d 71 (1989). Whether these formulations are in fact equivalents appears to be the subject of some discussion. *See Jackson v. Virginia*, 443 U.S. at 334, 99 S.Ct. at 2797 (Stevens, J., concurring); Hon. Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U.L.Rev. 979, 986-88, 993 (1993) (suggesting the possibility of important implicit differences, but acknowledging that any claimed distinction "might be largely semantic").

Id., at 319, 99 S.Ct. at 2789; *United States v. Rothrock*, 806 F.2d 318, 320 (1st Cir. 1986).

However, a court may not abdicate its obligations under Rule 29 by deeming the evidence to be legally sufficient simply because a properly instructed jury returns a guilty verdict. *Jackson v. Virginia*, 443 U.S. at 318, 99 S.Ct. at 2788. Similarly, the existence of "some evidence" from which every element of the charged offense could be found does not mean that the evidence, as a whole, is necessarily legally sufficient to permit a finding of guilt beyond a reasonable doubt.[6] *Id.* at 316, 99 S.Ct. at 2787. The evidence presented by the government must, as a whole, be of a quality and quantity sufficient to establish guilt beyond a reasonable doubt. *Id.; United States v. Loder*, 23 F.3d 586, 590 (1st Cir. 1994); *United States v. Doe*, 921 F.2d 340, 343-344 (1st Cir. 1990); *United States v. Smith*, 680 F.2d

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[6] Some precedent suggests that a guilty verdict must be supported by "substantial evidence" *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *Pierce v. United States*, 252 U.S. 239, 251-52, 40 S.Ct. 205, 210, 64 L.Ed. 542 (1920), or that "it is enough that the finding of guilt draws its essence from a plausible reading of the record." *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir. 1994) *citing United States v. Sepulveda*, 15 F.3d 1161, 1173 (1st Cir. 1993). At least three circuits appear to rely on some articulation of a "substantial evidence" standard in judging legal sufficiency. *See, e.g., United States v. MacCloskey*, 682 F.2d 468, 473 (4th Cir. 1982); *United States v. DeClue*, 899 F.2d 1465, 1471 (6th Cir. 1990); *United States v. Winner*, 666 F.2d 447, 451 (10th Cir. 1981). There does not appear to be any First Circuit decision precisely on point, *but cf. United States v. Francomano*, 554 F.2d 483, 486 (1st Cir. 1977) (granting judgment of acquittal where "no substantial evidence" supported conviction), nevertheless, it would seem that plausibility or substantiality is enough only if the evidence permits a reasonable juror to adhere to the plausible interpretation beyond a reasonable doubt.

255, 259 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110, 103 S.Ct. 738, 74L.Ed.2d 960 (1983).[7]

While the evidence need not exclude every reasonable hypothesis of innocence to support a conviction,[8] still, in measuring the persuasive value of all the evidence against the constitutional requirement of proof beyond a reasonable doubt, "it is equally true that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt." *United States v. Bell*, 678 F.2d 547, 550 (5th Cir. 1982) (*en banc*) (emphasis in original), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983); *see also United States v. Michelena-Orovio*, 719 F.2d 738, 759 (5th Cir. 1983) (Wisdom, J., dissenting); *United States v. Campion*, 560 F.2d 751, 753-754 (6th Cir. 1977), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984).

If a judge, restricting his or her review to the proper factors, determines that reasonable jurors must necessarily have a reasonable doubt as to guilt, a judgment of acquittal is constitutionally required. However, if a judge concludes that "a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is

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[7] In many cases, proper assessment of the totality of the evidence on the one hand, and impermissible weighing of the evidence on the other, may prove difficult to distinguish, *see, e.g., United States v. Mariani*, 725 F.2d 862, 866 (2d Cir. 1984) (finding error in the district court's consideration of the "strong possibility" that the evidence was consistent with innocence), but, a court cannot abandon the effort merely because it is difficult.

[8] *See Jackson v. Virginia*, 443 U.S. at 326, 99 S.Ct. at 2793; *United States v. Smith*, 680 F.2d 255, 259 (1st Cir. 1982); *United States v. Gifford, supra*.

for the jurors to make." *United States v. Kirvan*, 997 F.2d 963 (1st Cir. 1993), quoting *Curley v. United States*, 160 F.2d at 232.

Though the Rule 29 sufficiency standard is uniformly agreed upon, that consensus belies the complexity of its real world application. A judicial determination that evidence is "legally sufficient" implies an essentially objective conclusion based on principled application of law to fact, and further suggests that the same conclusion will ordinarily be reached by any judicial officer who properly applies established law to those same facts. However, where, as here, a prosecution is based on circumstantial evidence offered to prove specific intent by inference, and the case does not turn on the credibility of witnesses,[9] and the persuasive value of the evidence as a whole is not obviously adequate to meet the high standard of certitude required, reasonable jurists might well reach different, inherently subjective, conclusions. In that context, a Rule 29 motion raises

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[9] As to Count II (1987) the jury may be presumed to have discredited defendants' own testimony, which is a matter solely within the jury's province. The jury's "disbelief of a defendant's testimony may supplement already existing evidence and help make the evidence in a borderline case sufficient," but here that disbelief alone is insufficient to elevate the persuasive value of the evidence to the subjective degree of near certitude required to convict. *See United States v. Tyler*, 758 F.2d 66 (2d Cir. 1985):

> The extent to which a jury may translate its discrediting of a witness testimony into positive proof is limited. As the Supreme Court recently stated: "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."

United States v. Tyler, 758 F.2d at 70 n. 3, *quoting, Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

the following question. By what precise means should a trial judge "objectively" determine whether the evidence, as a whole, is sufficient to persuade a reasonable jury of the defendant's guilt beyond a reasonable doubt—as distinguished from being merely sufficient to persuade by a preponderance, or perhaps only clearly and convincingly—without resorting to his or her own, in part, inescapably subjective view of what evidence a reasonable jury could or could not find persuasive beyond a reasonable doubt? Is the realm between preponderance and "beyond reasonable doubt" objectively identifiable?

As Chief Judge Jon O. Newman[10] writes, the easy cases turn on total failures of proof with regard to an essential element of the crime charged. J.Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. Rev. 979, 989 (1993), *citing* e.g., *United States v. Lopez-Alvarez*, 970 F.2d 583, 593-94 (9th Cir. 1992), *cert. denied*, ___U.S. ___, 113 S.Ct. 504, 121 L.Ed.2d 440 (1992); *United States v. Casper*, 956 F.2d 416, 421-22 (3rd Cir. 1992); *United States v. Long*, 905 F.2d 1572, 1576-79 (D.C.Cir. 1990), *cert. denied*, 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990); *United States v. Bruun*, 809 F.2d 397, 404-05, 410-11 (7th Cir. 1987). The more complicated cases, like this one, require some form of judicial measuring of the evidence against varying degrees of subjective certitude that the evidence might evoke in a reasonable jury.

Courts have struggled with and debated a judge's proper role and the proper standard to be applied in that measuring process for decades. The eminent Learned Hand and the Court of Appeals for the Second Circuit once took the pragmatic view that so long as the prosecution presents evidence on every element sufficient to satisfy the lower civil "preponderance" standard, the evidence must necessarily be considered legally sufficient to support a finding of guilt beyond a reasonable doubt as well:

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[10] Chief Judge, United States Court of Appeals for the Second Circuit.

> We agree with Judge Amidon in *Hays v. United States*, supra, 231 F. 106 [(8th Cir. 1916)], who refused to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt. While at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use.

United States v. Feinberg, 140 F.2d 592, 594 (2d Cir. 1944) (Hand, J.)

But Judge Hand's approach was not generally accepted and has since been rejected by the Second Circuit and the Supreme Court. In *United States v.Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), the Second Circuit overruled *Feinberg*, holding that, "[i]mplicit in the [Supreme] Court's recognition of varying burdens of proof is a concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." The court went on to adopt Judge Prettyman's alternative view, expressed twenty-five years earlier in *Curley v. United States*, 160 F.2d 229 (D.C.Cir. 1947), *cert. denied*, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947):

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of two results, a reasonable doubt or no reasonable doubt is fairly possible, he must let the jury decide the matter. (footnotes omitted)

United States v. Taylor, 464 F.2d at 243, quoting *Curley v. United States*, 160 F.2d at 232-233.

In 1979 the United States Supreme Court endorsed Judge Prettyman's approach as well. *See Jackson v. Virginia*, 443 U.S. at 318 n.11, 99 S.Ct. at 2789 n.11. It is now settled law that what Judge Hand regarded as the "too thin line for day to day use" between "preponderance" and "beyond a reasonable doubt" must nevertheless be identified and enforced by the courts.

What little guidance exists as to how that line might be recognized is general in nature and seems to be found primarily in the Supreme Court's declared satisfaction with "the demonstrated ability of judges to distinguish legally sufficient evidence from evidence that rationally supports a verdict." *Tibbs v. Florida*, 457 U.S. 31, 44-45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652 (1982). *See also In re Winship*, 397 U.S. at 369, 90 S.Ct. at 1075 ("Notwithstanding Professor Wigmore's skepticism [about the ability to meaningfully measure degrees of certitude], we have before us a case where the choice of the standard of proof has made a difference. . . .") (Harlan, J., concurring).[11] Similar guidance was provided by Judge Prettyman in *Curley v. United States, supra*: "[t]he task of the judge in [determining the legal sufficiency of the evidence] is not easy, . . . but we know of no way to avoid that difficulty." 160 F.2d at 233.

Keeping in mind that the reasonable doubt standard "provides protection to the innocent only to the extent that the standard, in reality, is an enforceable rule of law," *Victor v. Nebraska*, ___ U.S. ___, ___, 114 S.Ct.1239, 1254, 127 L.Ed.2d 583, 604-05 (1994) (Blackmun, J., dissenting), a trial judge considering a Rule 29 motion is duty bound to enforce that constitutional standard. Otherwise, an essential check on improper conviction in marginally persuasive cases would be lost,

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[11] Justice Harlan referred to the fact that a New York Family Court Judge, sitting as trier of fact, "forthrightly acknowledged that he believed by a preponderance of the evidence, but was not convinced beyond a reasonable doubt," that a juvenile was delinquent. *In Re Winship*, 397 U.S. at 369, 90 S.Ct. at 1075.

and the constitutional promise of criminal conviction only upon proof of guilt beyond a reasonable doubt would amount to little more than an expedient and hollow aphorism.

Although he was writing about appellate review, Chief Judge Jon O. Newman's recent criticism, that in criminal cases judges do not always carefully respect different standards of proof, is of particular relevance to trial judges considering Rule 29 motions:

> courts . . . examine a record to satisfy themselves only that there is some evidence of guilt and do not conscientiously assess whether the evidence suffices to permit a finding by the high degree of persuasion required by the 'reasonable doubt' standard. The irony is that ever since winning the battle to discard [the] 'civil sufficiency' [i.e. Hand] approach, we have been losing the war to achieve meaningful appellate review of insufficiency claims in criminal cases.

J. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. Rev. at 989-90.

III. Sufficiency of the Evidence

Whether this is a case in which reasonable jurors fairly might or fairly might not have a reasonable doubt, or one in which reasonable jurors must have a reasonable doubt, is in my view a close question. Nevertheless, considering the evidence as a whole and in the light most favorable to the government under the appropriate Rule 29 standard, any reasonable jury must have a reasonable doubt about whether these defendants knowingly and voluntarily violated a known duty to file an accurate income tax return in 1987. While the evidence is of sufficient persuasive value to prove willfulness by the civil preponderance standard, it is not sufficient, as a matter of law, to persuade a reasonable jury beyond a reasonable doubt that the defendants acted willfully. A reasonable jury viewing this evidence might find that these defendants "could have" or even "probably" acted knowingly and intentionally, still, that reasonable jury must necessarily have substantial and reasonable doubts about defendants' specific intent, doubts engendered by the cumulative effect of the

uncontroverted facts and defendants' strong and reasonable hypothesis of innocence. Consider, for example, the following.

1. Defendants' business was entirely legitimate.

2. No cash transactions were involved and no cash hoards were involved.

3. The unreported income consisted of legitimate business payments, made in the form of checks, by other legitimate businesses. Those checks were made payable to defendants in their own names or the names of their business and were deposited in bank accounts held by them in their names or the names of their businesses.

4. The interest earned on those substantial payments/deposits was properly reported (which reporting is decidedly inconsistent with a conscious intent to hide the principal amount, but is consistent with both sloppy bookkeeping on defendants' part and inadequate professional attention by defendants' accountant).

5. Defendants employed the same independent and honest certified public accountant to prepare their returns during the years in question, and for a decade previously.

6. No evidence of collusion between defendants and their accountant was produced (to the contrary, the prosecution insisted that the accountant acted competently and independently). Because he acted honestly and independently his undisputed errors must be accepted as just that, errors. The accountant's workpapers reveal nothing indicating that he asked for or received answers to obvious professional questions likely to have resulted in either the reporting of the disputed amounts or the making of affirmative misrepresentations by defendants relative to their savings deposits, rental receipts, or shipping "rebates." Yet, those workpapers do include references sufficient to indicate disclosure by defendants and professional familiarity with, or at least a basis for inquiry into, such matters.

7. Defendants' behavior was inconsistent with what would be reasonably expected of persons who have knowingly hidden over $700,000 of income and filed a false tax return for 1987. For example, in 1988 they filed a claim for a relatively small tax refund, through their accountant, part of which was claimed for that very year. While one could rationally infer from that evidence that defendants were particularly inept tax defrauders, reason compels a substantial doubt about that perhaps plausible interpretation and its implication of criminal intent. Reason more strongly directs the inference and conclusion that defendants did not act knowingly in filing a false 1987 return because intentional tax evaders would not normally invite regulatory attention to fraudulent tax returns by seeking small refunds for the very year in which large fraud occurred. Thus, while the inculpatory inference could arise, it would be a weak one, given the soundness and reasonableness of the alternative.

8. Defendants employed their accountant to provide a broad range of legitimate services and generally confided in him relative to their financial situation. In particular, Mr. Olbres provided information from which the accountant prepared a projected business income statement for 1987 showing $1.9 million, nearly the exact amount realized. That statement was actually filed with the IRS by the accountant (albeit inexplicably) as part of defendants' earlier 1986 tax return.

9. Defendants maintained books and records from which their correct income could easily be determined, although their bookkeeping and financial management efforts were hardly models of competence.

10. No double set of books was kept; no false entries or alterations of existing records occurred; no cash transactions, fictitious payees, hidden or "off-shore" accounts, straws, false invoices, or other "badges of fraud" were shown to have been involved.

11. Defendants' unrebutted character evidence was strong, and entirely inconsistent with their having acted with fraudulent intent.

In addition, the following must be considered. Mr. Olbres was not personally involved in providing information to Mr. Dennett, the accountant, relative to tax preparation; Mrs. Olbres was charged with that responsibility. The accounting and financial management practices of this blossoming enterprise were hardly sophisticated and indeed could fairly be characterized as deplorably negligent. Mrs. Olbres administered the finances of a million dollar business in the same way she administered it when it began, on a part-time basis and in a primitive and disorganized manner.

The income discrepancy in 1987 was comprised of three basic classifications of funds: A substantial payment ($445,176.28) by Digital Equipment Corporation of an invoice, which was deposited in the business savings account; payments to the business by transportation companies (Mayflower and Greyhound) consisting of "rebates," "discounts," or "commissions," representing a percentage of invoices defendants paid for transporting trade show booths around the country; and rental income from commercial property owned by defendants.

As for the Digital payment, the amount was substantially deposited in the business savings account; a Form 1099 memorializing the payment was sent by Digital to defendants and the IRS; the interest generated from that deposit was reported to the IRS; and the paper trail relevant to that income was legitimate, unmarked, and easily followed.

Mr. Olbres collected rents from the rental properties and deposited them in legitimate accounts. Mr. Dennett had the lease agreement related to the Seabrook property among his papers and presumably could (and probably should) have ascertained the correct rental income ($48,000) from that property, rather than simply relying on handwritten notes supplied by Mrs. Olbres (which as it turns out were in error and were among his papers). And, Mr. Dennett was familiar with and had notes among his

papers from Mrs. Olbres referencing the "rent" paid relative to the "Barn" property,—the other comparatively small amount at issue. Could a rational inference of "willfulness" be drawn from the discrepancy between the amount reported and the amount actually received from the Seabrook lease, the omission of rental income from the "Barn" lease, and the summary notes listing $30,000 as rent (apparently derived from a prior lease)? Probably yes. Is that inference of sufficient persuasive value to establish Mrs. Olbres' (or Mr. Olbres') knowing intent to evade taxes, beyond a reasonable doubt? No. A reasonable doubt must exist in the context of this case for the reasons discussed above, absent something more. Perhaps Mr. Dennett's testimony would have exonerated Mr. and Mrs. Olbres, or perhaps it would have erased any obligatory doubt about their specific intent. But Mr.Dennett died prior to trial, and a jury cannot speculate or consider what he might have said about the matter had he lived.

The Mayflower/Greyhound "rebates," qualified as "income" for tax purposes (or, perhaps would more accurately be considered as off setting the business expense deduction defendants took for the paid transportation invoices, since the rebates reduced those expenses, assuming both expenses and rebates were 1987 transactions). Could a rational jury infer that Mrs. Olbres and/or Mr. Olbres knew those rebates constituted "income" and intentionally failed to report those amounts? Yes. But in context, that inference would not be a strong one, and would be insufficient to establish knowledge and intent beyond a reasonable doubt. The persuasive value of that inference is substantially diluted by Mrs. Olbres' unchallenged accounting incompetence, the technical complexity of the tax consequences of the rebate system they established, and the strong plausibility that an unschooled lay person could easily misconstrue the rebate as something other than "income," especially given both Mayflower and Greyhound's own failure to treat those rebates as income to defendants by sending Forms 1099 to them and IRS. And, of course, the rebates, or commissions, were deposited into accounts actually held by defendants and unquestionably associated with them. The fact of the "commissions'" existence,

if not the correct amounts, was also communicated to their accountant as evidenced by his work papers. All of which effectively undermines a conclusion of willfulness beyond a reasonable doubt, as a matter of law, as to failure to include those amounts.

This is not to say the government's case was, on the whole, unpersuasive. If, the question were put, "But couldn't a reasonable jury believe upon all the evidence that these defendants, although they were clumsy, careless, negligent and rather dim, nevertheless did blatantly intend to defraud the government of 1987 taxes due?," the answer would be "Yes." A jury certainly could rationally reach that conclusion. But not beyond a reasonable doubt. The evidence could rationally be interpreted as showing these defendants to be bumbling and blatant tax frauds, deliberately concealing income from their accountant, and entirely incapable of acting in a manner consistent with reasonable efforts to either successfully effect or conceal their crime. However, that interpretation is simply not supported by evidence of a persuasive value sufficient to place its conclusion—an inference of willfulness—beyond reasonable doubt as a matter of law.

Judge Bownes, writing for the Court of Appeals in *United States v. Clotida*, 892 F.2d 1098 (1st Cir. 1989), said:

> The essence of any truly civilized criminal justice system is fairness in the individual case. In reversing [the defendant's] conviction, we are reminded that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent [persons]are being condemned."
>
> *Id.*, at 1106, *quoting*, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,1072-73, 25 L.Ed.2d 368 (1970).

The evidence in this case, too, is adequate to support a finding of willfulness only if measured against a diluted standard of proof that would leave people in doubt whether innocent persons are being condemned.

> Our democracy rests in no small part on our faith in the ability of the criminal justice system to separate those who are guilty from those who are not. This is a faith which springs fundamentally from the requirement that unless guilt is established beyond all reasonable doubt, the accused shall go free.

Victor v. Nebraska, ___ U.S. ___, ___, 114 S.Ct. 1239, 1254, 127 L.Ed.2d 583 (1994) (Blackmun, dissenting).

The unavoidable subjective component of this analysis, placing the persuasive value of the evidence above the preponderance standard but below the beyond a reasonable doubt standard, essentially dictates the result, and because I find the persuasive value of the evidence to be incapable of persuading a reasonable jury of willfulness "beyond a reasonable doubt" as a matter of law, I also find the evidence of record to be insufficient to support defendants' conviction on Count II.

Concededly, under the civil preponderance approach, a different result would obtain. A different result might also obtain if the government were required to prove its case only by clear and convincing evidence. And, also concededly, if the precedent in this circuit is inconsistent with the *en banc* holding of the Court of Appeals for the Fifth Circuit in *United States v. Bell, supra*, a different result might obtain. I am not persuaded that the *Bell* rationale is inconsistent with this circuit's approach to analyzing insufficiency claims.

While juries are "perfectly entitled not to believe what may be inherently incredible," *United States v. Luciano Pacheco*, 794 F.2d 7, 10 (1st Cir. 1986), the totality of the evidence here establishes a hypothesis of innocence that is far from incredible. I find that defendants' hypothesis of innocence (negligence, incompetence, inattention, and reasonable reliance on the family's long-time certified public accountant) to be sufficiently reasonable and sufficiently strong and sufficiently credible that a rational trier of fact, considering the evidence as a whole, and even according the government every reasonable inference in its favor, must

necessarily entertain a reasonable doubt about defendants' guilt of the offense charged in Count II.

Accordingly, I am obligated to direct entry of judgment of acquittal on that Count.

IV. Conclusion

Defendants' motion for judgment of acquittal (document no. 87) is granted and the clerk is directed to enter judgment of acquittal on Count II in accordance with this Order, and to enter judgment of acquittal on Counts I and III in accordance with the jury's verdict.

SO ORDERED.

PROVISIONS

U.S. Const., Amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3731:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or

modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

29 Fed. R. Crim P. Motion for Judgment of Acquittal:

(a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) RESERVATION OF DECISION ON MOTION. The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such

motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) SAME: CONDITIONAL RULING ON GRANT OF MOTION. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE.

UNITED STATES OF AMERICA

v.

SHIRLEY A. OLBRES AND ANTHONY G. OLBRES

Criminal No. 93-27-1-2

JURY INSTRUCTIONS

* * * *

GOVERNMENT'S BURDEN OF PROOF—BEYOND A REASONABLE DOUBT

The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law does not impose upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

If after careful and impartial consideration of all of the evidence in this case, you have a reasonable doubt that the defendants are guilty of the charge, you must find the defendants not guilty. If you, the jury, find that the evidence in the case equally permits either of two conclusions—one consistent with innocence, the other consistent with guilt—the jury must adopt the conclusion that is consistent with innocence. The jury must never find a defendant guilty based on mere suspicion, conjecture, or guess. Rather, you must decide the case on the evidence that is before you and on the reasonable inferences that can be drawn from that evidence.